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July 15, 1993

SPECIAL COUNSEL  
JEROLD L. JACOBS

William F. Caton, Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-91  
FM Table of Allotments

Dear Mr. Caton:

Enclosed herewith, on behalf of Kingsley H. Murphy, Jr.,

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JUL 15 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. 93-91  
Table of Allotments, )  
FM Broadcast Stations ) RM-8197  
(Berlin, DeForest, Wautoma, and ) RM-8279  
Markesan, Wisconsin) )

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

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**JUL 15 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COUNTERPROPOSAL REPLY COMMENTS OF  
KINGSLEY H. MURPHY, JR.**

**KINGSLEY H. MURPHY, JR.** ("Murphy"), licensee of Station WISS-FM, Berlin, Wisconsin, by his attorneys, pursuant to §1.415(d) of the Commission's Rules and Public Notice, Report No. 1949, released June 30, 1993, hereby submits his Counterproposal Reply Comments in opposition to the June 9, 1993 "Counterproposal" of Mark J. Kastein d/b/a Markesan Broadcasting Company ("Markesan") (RM-8279) in this proceeding. In support whereof, Murphy shows the following:

1. This proceeding was initiated by Notice of Proposed Rule Making and Order to Show Cause ("NPRM"), 8 FCC Rcd 2747 (MM Bur. 1993), which proposed to allot Channel 226A to DeForest, Wisconsin as that community's first local transmission service, to substitute Channel 284A for Channel 272A at Berlin, Wisconsin and modify the license of Murphy's Station WISS-FM accordingly, and to substitute Channel 272A for

Channel 226A at Wautoma, Wisconsin and give cut-off protection to Wautoma's pending FM application.

2. In his previous Comments and Reply Comments, Murphy has already voiced his full support for the NPRM, apart from certain reimbursement and frequency-change implementation objections. The proposed WISS-FM channel substitution not only would allow the community of DeForest (1990 U.S. Census pop. 4482) to have its first local transmission service but also would permit WISS-FM to seek a 6-kilowatt Class A "upgrade," which is not technically feasible on WISS-FM's present frequency. On the other hand, in his Reply Comments Murphy demonstrated that the Markesan counterproposal was so flawed legally that it should be dismissed summarily. Murphy will now expand upon his objections to that counterproposal.

3. Markesan proposes that Channel 284A should be allotted as a first local transmission service to Markesan, Wisconsin (1990 U.S. Census pop. 1519), that no allotment should be made to DeForest, Wisconsin, and that the allotments at Berlin and Wautoma, Wisconsin should remain the same. Thus, it is mutually exclusive with the DeForest and Berlin allotment proposals in the NPRM and with another counterproposal proffered by Julie A. Blaser d/b/a Wautoma Radio Company ("Wautoma"), which the Commission did not place on the June 30, 1993 Public Notice, supra.

4. Noting that the same consulting engineer (Lyle Robert Evans) filed the Markesan and Wautoma mutually exclus-

ive counterproposals, Murphy submits that a presumption is created that either Mr. Evans is an undisclosed real party in interest in one or both of the counterproposals or that the stated intentions of one or both of the petitioners to construct their proposed facilities is not bona fide. Murphy maintains that the only plausible explanation for the conflicting Markesan/Wautoma filings here is an attempt by the proponents or their agent (Mr. Evans) to illegally "stack the deck" in this proceeding against DeForest and Murphy for illicit purposes. Certainly, Mr. Evans knew (or should have known) that he was simultaneously preparing inconsistent engineering counterproposals on behalf of two clients (submitted two days apart), and it strains credulity to believe that neither Markesan nor Wautoma was aware of the charade. Hence, Murphy urges that the Markesan counterproposal should be dismissed as an abuse of the Commission's processes.

5. When focusing on abusive use of filings in FM allotment proceedings in Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 ¶129 (1990), recon. denied, 6 FCC Rcd 3380 (1991), the Commission held:

A statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1105 of the Rules and would be subject to prosecution pursuant to Section 502 of the [Communications] Act [of 1934, as amended], forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions.

Thus, under the circumstances of the instant case, Murphy submits that the appropriate solution is to summarily dismiss both counterproposals as fatally defective and abusive of the Commission's processes. See FM Table of Allotments (Monterey TN et al.), 7 FCC Rcd 1606, 1607 ¶6 (1992) (issues concerning misconduct occurring inside an allotment proceeding are relevant to the determination concerning the action to be taken in that proceeding); FM Table of Allotments (Atlantic IA et al.), 7 FCC Rcd 1370, 1371 n.5 (MM Bur. 1992) (Commission will not allot a channel where there is no assurance that a party will file an application for the allotment). In other words, Murphy maintains that Markesan's abuse is not cured by the Commission's apparent refusal to consider the Wautoma counterproposal (see Paragraph 3, supra) and that Markesan's counterproposal should be dismissed in any event.

6. Alternatively, assuming arguendo that the Markesan counterproposal is not dismissed summarily, Murphy urges that the DeForest first-service proposal deserves a dispositive allotment preference over it. This is so because the Commission presumes that the most populace community has the greatest need for a first local service, provided that it has commensurately greater civic, cultural, religious, social, and commercial attributes. See Affinity Communications, Inc., 96 FCC 2d 685 (Rev. Bd.), rev. denied, FCC 84-625 (Comm'n 1984). In the instant case, the population of DeForest is more than twice that of Markesan, and Markesan has provided no socio-

economic information to rebut the presumption in favor of DeForest. Therefore, the DeForest proposal should prevail.

**CERTIFICATE OF SERVICE**

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 15th day of July, 1993, I have caused to be mailed, or hand delivered, a copy of the foregoing "COUNTERPROPOSAL REPLY COMMENTS OF KINGSLEY H. MURPHY, JR." to the following:

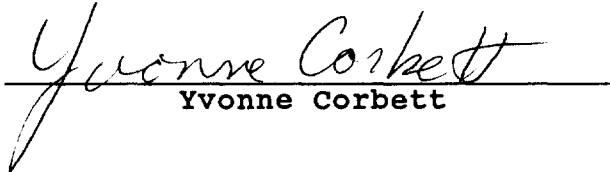
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**\*BY HAND**